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No. 86-702

SUPREME COURT OF THE UNITED STATES

October Term, 1986

R. LEE JOHNSON AND FRANCES K. JOHNSON,

Petitioners,

vs.

FEDERAL LAND BANK OF LOUISVILLE

AND

FARMERS PRODUCTION CREDIT ASSOCIATION OF ASHLAND,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether 12 C.F.R. §614.4510(d)(1) (1986), the statement of policy which provides for a means of forbearance under the Farm Credit Act of 1971 12 U.S.C.A. §2001 et seq. (1980) as amended, is merely a general statement of agency policy, or a substantive rule and the source of an affirmative legal obligation.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iii
STATUTES INVOLVED.....	1
COUNTERSTATEMENT OF THE CASE.....	3
ARGUMENT: REASONS FOR DENYING THE WRIT.....	5
I. Introduction.....	5
II. The Judgment Of The Supreme Court of Ohio Rests on Adequate And Independent State Grounds.....	6
III. The Lower Courts Have Concluded That 12 C.F.R §614.4510 (1986) Is Not A Substantive Rule But Is A General Statement Of Agency Policy.....	6
IV. The Decision Of The Supreme Court Of Ohio Is Correct.....	8
V. Congress Has Recently Provided A Means Of	

Review Of The Farm Credit System, And Mandatory Forebearance May Interfere With Congress' Preferred Method For Ensuring The Availability Of Adequate Credit To Farmers And Agribusiness.... 10

CONCLUSION 11

TABLE OF AUTHORITIES

Cases:

Aberdeen Production Credit Ass'n v. Jarrett Ranches, 638 F. Supp. 534 (D.S.D. 1986)..... 11

Bowling v. Block, 602 F. Supp. 667 (S.D. Ohio 1985), aff'd, 785 F. 2d 556 (6th Cir. 1986), cert. denied, 55 U.S.L.W. 3233 (1986)..... 10, 11

Chrysler Corp. v. Brown, 441 U.S. 281 (1979)..... 12, 13

Cramp v. Board of Public Instruction, 368 U.S. 278 (1961)..... 7,8

DeLaigle v. Federal Land Bank of Columbia, 568 F. Supp. 1432 (S.D. Ga. 1983).. 8,9, 11

Farmers Production Credit Ass'n of Ashland v. Johnson, 24 Ohio St. 3d 69 (1986).... 5,6

Federal Land Bank of Springfield v. Saunders, 108 A.D. 2d 838, 485 N.Y.S. 2d 342 (1985)..... 11

Federal Land Bank of Wichita v. Reed, 237 Kan. 751, 703 P. 2d 777 (1985)..... 11

Herb v. Pitcairn, 324 U.S. 117 (1945)..... 7,8

Jankovich v. Indiana Toll Road Commission, 379 U.S. 487 (1965)..... 7,8

Smith v. Russellville Production Credit Ass'n, 777 F. 2d 1544 (11th Cir. 1985) 9, 13

Spring Water Dairy, Inc. v. Federal Intermediate Credit Bank of St. Paul, 625 F. Supp. 713 (D. Minn. 1986)... 10

Statutes:

Farm Credit Act of 1971, 12 U.S.C.A. §2001 et seq. (1980)..... i, 10

12 C.F.R. §614.4510 (1986)..... 1,7, 8,9,10

12 C.F.R. §614.4510(d)(1) (1986)... 3,5, 6,12,13

24 C.F.R. §203.500 (1986)..... 9

Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, Title V, Section 501,99 Stat. 1710 (1985)..... 1,2, 3,13,14

Statutes Involved

In addition to those statutes cited by Petitioners, this case involves 12 C.F.R. §614.4510 (1986) which discusses the need to protect the interests of the mortgagee as well as the mortgagor. It provides:

> (1) Term Loans. The objective shall be to provide borrowers with prompt and efficient service with respect to justifiable actions in such areas as personal liability, partial release of security, insurance requirements or adjustments, loan division or transfers, conditional payments, extensions, deferments or reamortizations. Procedures shall provide for adequate inspections, reanalysis, reappraisal, controls on payment of insurance and taxes (and for payment when necessary), and prompt exercise of legal options to preserve the lender's collateral position or guard against loss. The policy shall provide a means of forbearance for cases when the borrower is cooperative, making an honest effort to meet the conditions of the loan contract, and is capable of working out of the debt burden. Loan servicing policies for rural home loans shall recognize the inherent differences between

agricultural and rural home lending.

Further, the Farm Credit Amendments Act of 1985, Public L. No. 99-205, Title V, Section 501,99 Stat. 1710 (1985), is instructive as to certain Congressional intentions and it provides:

> "(a) The President shall appoint a National Commission on Agricultural Finance. Such Commission shall be comprised of 15 members, of whom 7 shall be appointed by the President and 4 each by the Speaker of the House of Representatives and the President pro tempore of the Senate. The Commission shall consist of representatives of the financial community, the agricultural sector, and government.
>
> "(b) The National Commission on Agricultural Finance shall conduct a study of methods to ensure the availability of adequate credit to agriculture products and agribusiness, taking into account the long-term financing needs of the agricultural economy; the roles of the commercial banks, the Farm Credit System, and the Farmers Home Administration in meeting those financial needs.

"(c) In conducting such study, the National Commission on Agricultural Finance shall--

"(1) evaluate the financial circumstances relative to both lenders and borrowers of farm credit;

"(2) evaluate the structure, performance, and conduct of private lenders--commercial bankers and the Farm Credit System--and public lenders;

"(3) explore the need for long-term assistance in stabilizing the value of agricultural assets; and

"(4) evaluate the effect on suppliers, producers, processors, and local communities when financial institutions fail.

"(d) Not later than one year after the date of the enactment of this Act [Dec. 23, 1985], the Commission shall submit a report containing the results of the study required by this section, together with comments and recommendations for legislation providing for a sound, reasonable, and primarily self-supporting credit program for farmers and ranchers as the Commission considers appropriate, to Congress.

"(e) The Commission shall be comprised of volunteers and no Federal funds shall be expended by the Commission."

Counterstatement of The Case

This case below consisted of two actions consolidated for review. Two Farm Credit Banks, Farmers Production Credit Association of Ashland ("PCA") and Federal Land Bank of Louisville ("FLB") held mortgages on separate portions of Petitioners' farm as security for loans. Both brought foreclosure actions and prevailed.

In each case, petitioners attempted to assert as a defense the "means of forbearance" provision in 12 C.F.R. §614.4510(d)(1) (1986) after the trial court had issued separate rulings granting the lender summary judgment. Petitioners' attempt to belatedly assert the defense became procedurally complex. In the PCA

case, Petitioners filed a Civ. R. 15(A) motion for leave to file an amended answer alleging the "forbearance" defense. In the FLB case, they filed an appeal from the granting of summary judgment and while it was pending filed a Civ. R. 60(B) motion claiming "mistake" and "inadvertence" as grounds. They later supplemented that motion alleging a "forbearance" defense. The Civ. R. 60(B) motion was denied and Petitioners filed another appeal. The Court of Appeals affirmed both the granting of summary judgment and the denial of the Civ. R. 60(B) motion. The Supreme Court of Ohio denied a motion to certify as to each appeal. Thereafter, Petitioners filed yet another Civ. R. 60(B) motion seeking another ruling on the earlier Civ. R. 60(B) motion and a motion to amend their answer. The trial court overruled the motions, and the Court of Appeals affirmed.

The Supreme Court of Ohio in the PCA case affirmed the trial court's denial of Petitioners' motion to amend their answer, agreeing with the Court of Appeals that the trial court had not abused its discretion. In the FLB case, the Supreme Court of Ohio affirmed the denial of Petitioners' Civ. R. 60(B) motion, agreeing with the Court of Appeals that the requirements of Civ. R. 60(B) had not been met. "'A claim that a lawsuit which has been decided and for which all appeal has ended was incorrectly decided is not the kind of "mistake" or "inadvertence" contemplated in Civ. R. 60'". Farmers Production Credit Ass'n of Ashland v. Johnson, 24 Ohio St. 3d 69, 75 (1986). The Court also held that the "means of forbearance" provision in 12 C.F.R. §614.4510(d)(1) (1986) is not a substantive rule, but rather a general statement of policy which does not provide

a valid defense to a foreclosure action. The Court further noted that the Farmers Production Credit Association ("PCA") had a written policy of forbearance which was applied in the administration of its loan. Only after it was determined by the PCA that the sole method remaining for it to collect from Petitioners was through a foreclosure action did the PCA begin to foreclose, some two months after an August 1, 1983 loan extension deadline. Thus, even assuming arguendo that the regulation setting a policy of forbearance was a basis for a defense, the Court indicated an unwillingness to second-guess the lender's determination ". . as to whether the conditions have been met, especially with regard to the borrowers' ability to pay the debt." Id. at 74.

In sum, the Supreme Court of Ohio ruled that 12 C.F.R. §614.4510(d)(1) (1986) does

not provide a valid defense to a foreclosure action, even if Petitioners had timely asserted such a defense in their answers to the foreclosure complaints.

Respondents[1] are otherwise satisfied with Petitioners' statement of the parties to the proceeding, their citation of the lower court's opinion and their jurisdictional statement.

Argument: Reasons for Denying the Writ

I. Introduction

Petitioners have failed to establish any special or important reason why this Court should exercise its discretionary jurisdiction. As demonstrated below, the

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1. As required by Rule 28.1, Rules of the Supreme Court of the United States, all parent corporations, subsidiaries, and affiliates of each corporate defendant are as follows: Federal Land Bank of Louisville, Farmers Production Credit Association of Ashland, Federal Land Bank Association of the Fourth District, and Federal Intermediate Credit Bank.

lower courts are in accord that 12 C.F.R. §614.4510 (1986) is a regulation directed to agency policy, and is not a substantive rule. The decision of the Supreme Court of Ohio correctly held that 12 C.F.R. §614.4510 (1986) does not have the force and effect of law and does not provide a valid defense to a foreclosure action.

Further, the Court held that the trial court did not abuse its discretion in denying Petitioners' motion for leave to amend their answer and for relief from judgment. This Court has traditionally adhered to the applicable principle that it will not review such judgments of state courts that rest on adequate and independent state grounds. Herb v. Pitcairn, 324 U.S. 117 (1945); Jankovich v. Indiana Toll Road Commission, 379 U.S. 487 (1965); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961).

II. The Judgment of The Supreme Court of Ohio Rests On Adequate and Independent State Grounds

This Court has held repeatedly that it will not review state court judgments that rest on adequate and independent state grounds. Id. As demonstrated in our Counterstatement of the Case, the Supreme Court of Ohio predicated its affirmance of the trial court's decisions on state procedural grounds. It found no abuse of discretion in the denial of a motion seeking to amend an answer nor in the trial Court's refusal to grant relief from judgment after all appeals had been exhausted. For this reason alone, this Court should not exercise its discretion to review the judgment of the Supreme Court of Ohio.

III. The Lower Courts Have Concluded That 12 C.F.R. §614.4510 (1986) Is Not A Substantive Rule But Is A General Statement of Agency Policy.

The lower courts overwhelming have determined that 12 C.F.R. §614.4510 (1986) is merely a statement of policy, as discussed below.

Petitioners rely solely on DeLaigle v. Federal Land Bank of Columbia, 568 F. Supp. 1432 (S.D. Ga. 1983), for the proposition that the forbearance language of 12 C.F.R. §614.4510 (1986) is a mandatory requirement in the servicing of farm loans, and that a violation of the policy within the regulation is a defense to a foreclosure action. However, DeLaigle has been essentially overruled by its own 11th Circuit Court of Appeals in Smith v. Russellville Production Credit Ass'n., 777 F.2d 1544 (11th Cir. 1985). In that case, the 11th Circuit disapproved DeLaigle and

determined that 12 C.F.R. §614.4510 (1986) is a regulation directed at agency policy, and is not a substantive rule. Id. at 1548. It squarely held that the "means of forbearance" regulation imposes no legal duty on PCAs to establish loan servicing techniques.[2]

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2. Petitioners seek to support their proposition by arguing that certain HUD regulations have the force and effect of law, and that non-compliance thereof may establish an equitable defense to a mortgage foreclosure action. However, contained in 24 C.F.R. §203.500 (1986) "Mortgage servicing generally," (which they neglected to discuss) is HUD's stated intent that no mortgagee commence foreclosure or acquisition of property until certain servicing requirements have been complied with. It further states that whether a mortgagee's failure to comply constitutes a legal defense to foreclosure is a matter to be determined by the courts. This language is strikingly different from 12 C.F.R. §614.4510 (1986), which establishes the parameters of loan servicing requirements of the Farm Credit Administration. 12 C.F.R. §614.4510 (1986) directs "the bank and associations to adopt loan servicing policies and procedures to assure that

Footnote 2 continued on next page . . .

The 6th Circuit too has reviewed the Farm Credit Act and reasoned that the Act creates no specific enforceable rights upon which a borrower can rely in seeking to bring a private right of action. Bowling v. Block, 602 F. Supp. 667 (S.D. Ohio 1985), aff'd, 785 F.2d 556 (6th Cir. 1986), cert. denied, 55 U.S.L.W. 3233 (U.S. 1986).

Other federal and state courts have followed similar reasoning. See Spring Water Dairy, Inc. v. Federal Intermediate Credit Bank of St. Paul, 625 F. Supp 713 (D. Minn. 1986) (The Farm Credit Act merely establishes a system for providing

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Footnote 2 continued from previous page . . . loans will be serviced fairly and equitably for the borrower while minimizing the risk for the bank and association." Although the statement contains a policy of forbearance under certain circumstances, no where does the regulation require, as does the HUD regulation, forbearance until the policy is complied with. Nor does it leave with the Courts the issue of non-compliance as a possible affirmative defense.

additional credit to farmers, and does not confer specific enforceable rights); Aberdeen Production Credit Ass'n. v. Jarrett Ranches, 638 F. Supp. 534 (D.S.D. 1986) (The Farm Credit Act does not proscribe any conduct as unlawful or create specific enforceable rights on behalf of borrowers); Bowling v. Block, 602 F. Supp. 667 (S.D. Ohio 1985) (The Farm Credit Act does not create specific enforceable rights); Federal Land Bank of Springfield v. Sanders, 108 A.D. 2d 838, 485 N.Y.S. 2d 342 (1985) (The means of forbearance policy does not have the force and effect of law, but is designed to guide discretion); and Federal Land Bank of Wichita v. Read, 237 Kan. 751, 703 P.2d 777 (1985) (A policy of forbearance is required by the regulation, 12 C.F.R. §614.4510 (1985), but there is no statutory authority for court review of such a policy determination).

In sum, the decision below of the Supreme Court of Ohio is fully in accord with the reported decisions of lower federal and state courts, except for Delaigle, 568 F.Supp. at 1432, which has been effectively overruled by the 11th Circuit. Respectfully, it is unnecessary for this Court to exercise its jurisdiction in this case.

IV. The Reasoning Of The Supreme Court Of Ohio Is Supported By Decisions of This Court.

Without the necessary substantive characteristics a regulation cannot be the source of an affirmative legal obligation. Chrysler Corp. v. Brown, 441 U.S. 281 (1979). Such a regulation must be a substantive rule with the force and effect of law and must be distinguished from "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." Id. at 301.

As demonstrated in several of the lower court opinions cited above, the "means of forbearance" regulation in issue is not such a substantive rule. It is no more than a general statement of policy or rule of agency organization, procedure, or practice.

> The regulation states that, when banks and associations develop their loan servicing policies and procedures, "the policy shall provide a means of forbearance" for borrowers meeting certain criteria. 12 C.F.R. §614.4510(d)(1) (emphasis added). Although the term "shall" indicates the mandatory nature of this policy, the regulation is nevertheless directed at agency policy, and is not a substantive rule. Accordingly, we hold that 12 C.F.R. §614.4510(d)(1) does not have the force and effect of law...

Smith v. Russellville Production Credit Assn., 777 F.2d at 1548. The analysis established by this Court in Chrysler Corp. v. Brown, 441 U.S. at 281, compels the conclusion that the language of 12 C.F.R.

§614.4510(d)(1) (1986) is not the source of an affirmative legal obligation, and therefore does not provide a valid defense to a foreclosure action.

V. Congress Has Recently Provided A Means Of Review Of The Farm Credit System, And Mandatory Forbearance May Interfere With Congress' Preferred Method For Ensuring The Availability Of Adequate Credit To Farmers And Agribusiness.

Petitioners suggest that mandatory forbearance is the only means of assuring the continued existence of the American farm. To the contrary, before this case was decided by the Supreme Court of Ohio on June 11, 1986, Congress enacted the Farm Credit Amendments Act of 1985 on December 23, 1985. The Act creates the National Commission on Agricultural Finance to "conduct a study of methods to ensure the availability of adequate credit to agriculture producers and agribusiness,

taking into account the long-term financing needs of the agricultural economy; the roles of the commercial banks, the Farm Credit System, and the Farmers Home Administration in meeting those financial needs." Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, Title V, §501,99 Stat. 1710 (1985), quoted in 12 U.S.C.A. §2001 (West Supp. 1986). This Commission has one year from the date of its creation (Dec. 23, 1985) to "evaluate the financial circumstances relative to both lenders and borrowers of farm credit...(and) evaluate the structure, performance, and conduct of private lenders-commercial bankers and the Farm Credit System..." Id. at Title V, §501(c)(1) and (2). If the Commission determines there is a need for mandatory forbearance such as Petitioners suggest, it may so report to the Congress in its comments and recommendations for any

proposed legislation it believes is needed for a sound, reasonable, and primarily self-supporting credit program for farmers and ranchers.

Conclusion

For the reasons we have discussed, Respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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